TELEKOM CELLULAR SDN BHD

v.

KABELECT SDN BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-03-72-1997]
25 MARCH 2000

CIVIL PROCEDURE: *Summary judgment - Appeal - Payment by appellant through letter not marked "without prejudice" - Payment made before hearing of appeal against summary judgment - Whether basis of appeal destroyed by payment*

The respondent obtained a summary judgment against the appellant. The appellant filed a notice of appeal to the judge in chambers against the summary judgment as well as applied for a stay of execution. The application for stay was refused. The appellant by a letter paid the judgment sum and interest to the respondent. The respondent then applied to the judge in chambers to strike out the appellant's appeal on the ground that the whole substratum of the appeal had been destroyed. The judge allowed the respondent's application. The appellant appealed.

Held:
Per NH Chan & Abdul Malek Ahmad JJCA

[1] In the present case, the appellant did file a notice of appeal against the summary judgment. This makes it distinguishable from the case of *Metropolitan Real and General Property Trust Ltd*, where the judgment was not appealled against and only a stay of execution was applied for.

[2] In the *Metropolitan* case, there was no dispute that the defendants owed a sum of money ordered by the court to be paid whereas in the present case, the appellate court still have to determine whether the summary judgment was correctly made.

[3] Under the Courts of Judicature Act 1964 an appeal does not operate as a stay of execution. The *lis* is not ended by the payment because the decision of the appellate court would have affected the substantive right of the parties.

[4] The judge was wrong to dismiss the appellant's appeal on the ground that the payment would have destroyed the basis of the appeal.

Per Mokhtar Sidin JCA (dissenting)

[1] Section 94 of the Evidence Act 1950 means that when the language used is clear and exclusive, no extraneous evidence can be supplied or implied into the contrary or to bring about any other conclusion. The learned judge was right when he refused to allow the appellant to adduce evidence to contradict the contents of the appellant's solicitor's letter.

[2] The letter enclosing full payment of the judgment sum and the interest thereon without stating "without prejudice" tantamount to an admission of the respondent's claim under O. 27 r. 3 of the Rules of the High Court 1980.

[3] The learned judge was also right in applying the principle laid down in the case of *Metropolitan Real and General Property Trust Ltd*, that when full payment is made of a judgment sum, then the basis of the appeal is destroyed.

[Appeal allowed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden memperolehi penghakiman terus terhadap perayu. Perayu memfailkan notis rayuan kepada hakim dalam kamar terhadap penghakiman terus tersebut dan juga memohon untuk mendapatkan satu penggantungan perlaksanaan. Permohonan untuk penggantungan telah ditolak dan perayu melalui sepucuk surat membayar jumlah penghakiman tersebut dengan faedah kepada responden. Responden kemudian memohon kepada hakim dalam kamar untuk membatalkan rayuan perayu tersebut atas alasan bahawa keseluruhan sublapisan rayuan telah musnah. Hakim membenarkan permohonan responden. Perayu merayu.

Diputuskan:
Oleh NH Chan & Abdul Malek Ahmad HHMR

[1] Dalam kes ini, perayu telah memfailkan satu notis rayuan terhadap penghakiman terus tersebut. Ini membezakannya dari kes *Metropolitan Real and General Property Trust Ltd*, di mana penghakiman tidak dirayui dan hanya penggantungan pelaksanaan yang dipohon.

[2] Dalam kes *Metropolitan*, tidak terdapat pertikaian yang defendan-defendan terhutang sejumlah wang yang diperintahkan oleh mahkamah supaya dibayar, sebaliknya dalam kes ini mahkamah rayuan masih perlu menentukan samada penghakiman terus telah dibuat dengan betul.

[3] Di bawah Akta Mahkamah Kehakiman 1964 rayuan tidak beroperasi sebagai penggantungan pelaksanaan. Tindakan guaman ini tidak tamat disebabkan pembayaran itu kerana keputusan mahkamah rayuan mungkin akan menjejaskan hak substantif pihak-pihak.

[4] Hakim telah bertindak secara salah ketika menolak rayuan perayu atas alasan bahawa pembayaran tersebut pastinya telah memusnahkan asas rayuan itu.

Oleh Mokhtar Sidin HMR (menentang)

[1] Seksyen 94 Akta Keterangan 1950 bermaksud bahawa bilamana bahasa yang digunakan adalah jelas dan eksklusif, tiada keterangan tambahan boleh dibekalkan atau dibayangkan secara bertentangan atau menyebabkan satu kesimpulan yang lain. Hakim yang bijaksana betul apabila beliau enggan membenarkan perayu mengemukakan keterangan bagi mencanggah kandungan surat peguamcara perayu itu.

[2] Surat yang melampirkan kesemua pembayaran jumlah penghakiman dan faedah ke atasnya tanpa menyatakan "tanpa prasangka" sama seperti satu pengakuan mengenai tuntutan responden di bawah A. 27 k. 3 Kaedah-Kaedah Mahkamah Tinggi 1980.

[3] Hakim yang bijaksana juga betul dalam menggunapakai prinsip yang dibentangkan dalam kes *Metropolitan Real and General Property Trust Ltd*, bahawa apabila pembayaran penuh dibuat bagi sesuatu jumlah penghakiman, maka asas rayuan tersebut termusnah.

[Rayuan dibenarkan dengan kos.]

Case(s) referred to:

Baker v. Turner [1950] 1 All ER 834 ***(refd)***

Folin & Brothers Sdn Bhd (In Receivership) v. Wong Foh Ling & Ors [1991] 1 CLJ 743 ***(refd)***

Kamla Devi v. Takhatmal AIR [1964] vol 51 ***(refd)***

Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn Bhd [1970] 2 MLJ 111 ***(refd)***

Metropolitan Real and General Property Trust Ltd v. Slaters and Bodega Ltd [1941] 1 All ER 310 ***(dist)***

North Eastern Railway Company v. Hastings [1900] AC 260 ***(refd)***

Rankine v. Garton Sons & Co Ltd [1979] 2 All ER 1185 ***(refd)***

Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah [1995] 3 CLJ 610 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 94

Rules of the High Court 1980, O. 14, O. 27 r. 3

For the appellant - Ambiga Sreenevasan (Sitpah Selvaratnam & Alan Adrian Gomez with him); M/s Skrine & Co
For the respondent - V Sivaparanjothi (Peter Raj & W Satchithanadhan with him); M/s VK Lingam & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D6-22-296-1997]

Reported by Yow Ting Fong

JUDGMENT

NH Chan JCA:

Under a written contract dated 15 September 1995, the respondent claimed to have rendered service to the appellant by supplying and erecting micro-wave television towers for the appellant throughout Malaysia. The respondent claimed that they have not been paid and sued the appellant. On 8 July 1997 the respondent had obtained from the deputy registrar an O. 14 judgment against the appellant. On 9 July 1997 the appellant filed a notice of appeal to the judge in chambers. On 18 July 1997 the appellant sent two cheques to the respondent "in full and final satisfaction of the said judgment". The appellant's appeal to the judge below was struck off by the judge on the ground that the whole substratum of the appeal was destroyed by the payment. Hence the appellant's appeal to the Court of Appeal.

Counsel for the respondent relied on *Metropolitan Real and General Property Trust Ltd v. Slaters and Bodega Ltd* [1941] 1 All ER 310. The headnote is significant and I quote from it, thus (310):

> Judgment was given against the defendant for the recovery of a sum of money and leave was given to the plaintiff to proceed to execution. The defendant thereupon obtained leave to appeal against the **latter** order, but no stay of execution was directed:
>
> HELD: **in such a case,** a stay of execution ought to be granted automatically, since, if the debtor is compelled to pay the sum recovered, the basis of the appeal is destroyed. (emphasis added)

There in the *Metropolitan* case, there was no appeal against the judgment. The appeal there was against the order giving leave to the plaintiff to proceed to execution. Since there was no stay of execution directed against the order which gave leave to execute on the judgment, the basis of the appeal was destroyed by the payment of the judgment amount. The *Metropolitan* case was distinguished by the House of Lords in *Baker v. Turner* [1950] 1 All ER 834. This is how Lord Porter put it, at 839:

> As to the second case (the *Metropolitan* case) **there was no dispute that the defendants owed a sum of money ordered by the court to be paid,** but they applied under the courts (Emergency Powers) Act, 1939, for a stay of execution and resulting postponement of payment. The learned judge, reversing the order of the master, gave the plaintiffs leave to proceed to execution and also granted leave to appeal, but made no order staying execution. Before the appeal was heard, the defendants paid all sums due under the judgment. In these circumstances, as the only remedy would have been to order the repayment to the defendants of a sum admittedly due and paid, the Court of Appeal held that the basis of the appeal was destroyed. **But that decision depended, in my view, on the fact that the sum paid was admittedly due, and the only application before the court was for a temporary stay.** (emphasis added).

In *Baker v. Turner* Lord Porter pointed out that the judgment sum in the *Metropolitan* case was admittedly due because there was no appeal against the judgment. The only application before the court in that case was for a temporary stay of execution so as to allow the defendant time to pay. The position in the present case is very different from the situation in the *Metropolitan* case. Here, in the present case, the appellant has appealed against the judgment and under the Courts of Judicature Act 1964 an appeal does not operate as a stay of execution. The *lis* is not ended by the payment because the decision of the appellate court would have affected the substantive right of the parties. This is what Lord Porter said, *ibid* at 839:

> If, as is the position in this case, the decision of the appellate court would have affected the substantive right of the parties, the decision (in the *Metropolitan* case) would have been otherwise. The *lis* is not ended by the levying of execution or by the landlord obtaining possession of the house; he may have achieved his object by a mistaken decision which it is your Lordships' function to rectify. The preliminary point, in my opinion, fails, and accordingly the House is faced with the duty of determining whether the judgment of the Court of Appeal was right or not.

Similarly, the decision of the appellate court would have affected the substantive right of the parties in the present case. The *lis* is not ended by the payment of the judgment sum as the appeal proper to the judge in chambers is still outstanding. The appellate court is still faced with the duty of determining whether the judgment of the registrar was right or not. In my judgment, I hold that the judge was wrong to dismiss the appellant's appeal to him on the ground that the payment would have destroyed the basis of the appeal. The appeal on the merits to the judge in chambers from the registrar's decision is, therefore, still undetermined. He has still to decide whether the judgment of the registrar was right or not.

I would allow the appeal with costs here and in the courts below.

Abdul Malek Ahmad JCA:

Having read the judgment of my learned brother NH Chan, JCA, I totally agree with the reasoning and conclusion therein and have nothing to add.

Mokhtar Sidin JCA:

By a contract in writing dated 15 September 1995, the respondent had between September 1995 and December 1996 rendered various services for the decision, manufacturing, supply, erection and commissioning of microwave telecommunication towers and telecommunication masts inclusive of civil and structural works at the appellant's project sites throughout Peninsular Malaysia. The respondent demanded from the appellant the sum due and payable under the contract and despite several reminders the appellant refused to settle the amount. The respondent then instituted the present action in the High Court, Kuala Lumpur. The senior assistant registrar gave summary judgment to the respondent for the sum of RM7,564,369.15 with interest and cost. On 9 July 1997 the appellant filed a notice of appeal to the judge in chambers. At the same time the appellant also applied for a stay of execution of the judgment sum which was refused by the senior assistant registrar. Instead of appealing against the order of refusal or making a fresh application for a stay from the judge, the appellant by a letter dated 18 July 1997 paid the judgment sum and the interest thereon to the respondent's solicitor. The relevant letter reads:

> 18th July 1997
>
> Messrs V K Lingam & Co **By Hand**
> Level 10 Menara Shahzan Insas
> No. 30 Jalan Sultan Ismail
> 50250 Kuala Lumpur.
>
> Dear Sirs,
>
> **KUALA LUMPUR HIGH COURT SUIT NO. D6-22-296-1997**
> **KABELECT SDN BHD V TELEKOM CELLULAR SDN 3RD**
>
> In accordance with the Judgment awarded by Court on 8th July 1997 in the abovementioned suit, *we enclose herewith two MPBB cheques nos. 661608 and 661655 for the sums of RM8,054,911.24 and RM3,315.89 respectively as full and final payment in satisfaction of the said judgment.*
>
> Kindly acknowledge receipt of the same. (emphasis made).

As can be seen the letter is a short and straightforward one. The words "without prejudice" was not written on it.

On receiving the above payment the respondent applied to the judge in chambers to strike out the appellant's appeal against the summary judgment on the ground that the whole substratum of the appeal had been destroyed. After hearing the parties the learned judge allowed the application by the respondent and struck off the appellant's appeal. Being dissatisfied with that decision the appellant then appealed to this court.

As the first ground the appellant contended that the learned judge erred in fact and in law in applying s. 94 of the Evidence Act 1950 to the abovementioned letter when he refused to allow the appellant to adduce evidence to contradict the contents of that letter. In his judgment the learned judge said:

> ... If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions. ...

The learned judge was of the view that the words used in the letter were of choice and select – plain and precise in its natural meaning, accurately applying the facts to the case. Therefore, the language being clear and exclusive, no extraneous evidence can be supplied or implied to the contrary or to bring about any other conclusion. To support his judgment the learned judge cited *Kamla Devi v. Takhatmal* AIR [1964] Vol. 51, a Supreme Court of India decision where Subba Rao J at p. 386 held:

> Section 94 of the Evidence Act lays down a rule of interpretation of the language of a document when it is plain and applies accurately to existing facts. It says that the evidence may be given to show that it was not meant to apply to such facts. When a court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.

Similar sentiment was expressed by the Privy Council in *North Eastern Railway Company v. Hastings* [1900] AC 260 where Earl of Halsbury LC at p. 263 said:

> The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.
>
> So far as I am aware, no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the Instrument itself.

Lord Brampton in the same case at p. 270 said:

> As it stands, it seems to me to be clear and free from ambiguity, and incapable of any other construction that assigned to it by the respondent. Certainly there is nothing to be found in the rest of the agreement to suggest any other interpretation. But it is said that it must have been differently understood by the parties themselves, and that the omission by the plaintiff and his predecessor for upwards of forty years to claim the rents now sought to be recovered is cogent evidence that such was the case. I grant that if the clause were capable of two constructions, one of which would support, the other of which would defeat the claim, the omission would afford irresistible proof that the latter was the interpretation intended by the parties. No such ambiguity, however, exists, and it seems therefore to me that, in the absence of any proof to the contrary, it must be assumed that the parties knew and understood the language they were using, and that in executing the agreement containing that clause they were truly expressing their intentions, and are bound by the writing they have signed. Why the agreement was so framed – what were the considerations which induced it – and why the claim was so long allowed to sleep are mere matters of speculation; but one has no right to act upon speculation to set aside a deed or agreement which is on the face of it clear and definite.

As can be seen the letter is short, simple and straightforward without any ambiguity whatsoever. When the appellant wrote the letter and enclosing the cheques the intention of the appellant was to make full and final settlement of the judgment sum and the interest thereon. Apparently, in advancing an amount in excess of the judgment sum awarded by the court, the appellant had calculated the interest up to the date when the payment was made, ie, the date the letter was written. In my view the letter is incapable of any other meaning because the words used are plain and simple especially the emphasis I have made.

As I have said earlier the words "without prejudice" are not found written anywhere on that letter which indicated that the letter was written without any reservation as to its meaning and the payment made. As such the learned judge was right when he refused to allow the appellant to adduce evidence to contradict the contents of that letter. It is clear from the evidence that the respondent did not make any demand for payment after the senior assistant registrar gave judgment. The only thing that the respondent did was to resist the appellant's application for a stay. In my view the respondent did nothing to prompt the appellant to make the payment.

That being the case, I am in agreement with the submission by the learned counsel for the respondent that the letter enclosing the full payment of the judgment sum and the interest thereon tantamount to an admission of the claim by the plaintiff. This is what Lord Justice Geoffrey Lane said in *Rankine v. Garton Sons & Co. Ltd.* [1979] 2 All ER 1185 at p. 1191:

> It is obviously better if precision can be reached one way or another by the defendants who are intending to make one or other of those admissions and then this sort of situation and this sort of arguments will not of course arise. But like it or not, there probably always will be letters in the 'no man's land' between those two extremes which the court will have to try to construe in order to discover whether the provisions of RSC Ord 27, r 3 are applicable or not.
>
> When that type of admission is under consideration, the simple question to be asked is this: have the defendants made a clear admission on liability or not? And in order to discover that, as I have already observed, one has to look at the terms of the letter and of the pleadings in each particular case.

In my view, the learned judge had not erred when he said that the letter dated 18 July 1997 with the words "full and final payment in satisfaction of the said judgment" is an admission by the appellant of the judgment sum. It is to be noted the letter was written by a solicitor of an established firm clearly on the instructions of the appellant. If it is intended otherwise there are many ways for which the payment could be made such as depositing the judgment sum in court pending the disposal of the appeal.

It was submitted by learned counsel for the respondent that the letter enclosing the full payment is an admission under O. 27 r. 3 of the Rules of the High Court 1980 which provides:

> 3. *Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to,* without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons. (emphasis made).

As to the meaning of "or otherwise" found in that rule is explained by Dr. Zakaria M. Yatim J (as he then was) in the case of *Folin & Brothers Sdn. Bhd. (In Receivership) v. Wong Foh Ling & 2 Ors.* [1991] 1 CLJ 743 where at p. 744 His Lordship said:

> Under the rule, the admission may be made in the pleadings or otherwise. The words "or otherwise" include an admission made by letter stating facts which show that the defendant has no defence to the action, *Ellis v. Allen* [1914] 1 Ch 905.

In *Malacca Precast Concrete Works v. William Jacks & Co. (M) Sdn. Bhd.* [1970] 2 MLJ 111 it was held that where a letter from solicitors amounting to an admission of liability, the trial judge was right in giving judgment solely on such admission. Ali Hassan FJ (as he then was) at p. 113 said:

> On the remaining question whether the letter from Mr JK Tan amounts to an admission of liability to pay the sum claimed by the Plaintiffs, I have no doubt that Sharma J was right in his conclusion that it was such admission. The implication of the letter is so clear that no other conclusion is possible.

Low Hop Bing J in *Tom Manas Enterprise Sdn. Bhd. v. Soh Ah Wah* [1995] 3 CLJ 610 at pp. 611 and 612 said:

> In my judgment, I hold that an admission made by letter, of facts which show that the defendant has no defence to the action, may be sufficient to enable the plaintiff to obtain judgment (*Ellis v. Allen* [1914] 1 Ch 904, *Malacca Precast Concrete Works v. William Jacks Co (M) Sdn Bhd* [1970] 2 MLJ 111).
>
> ... In my judgment, there is abundant authority to support the proposition that the Courts can consider and decide on the admissions made before or after legal proceedings have been commenced.

Relying on the abovestated authorities, I am of the view that in the present case the learned judge came to the correct conclusion when he said:

> The admission of the statement of facts in or by the said letter, originating from the defendants solicitors becomes admissible; as it being made between the same parties without the reservation of any qualification as to its admissibility. The defendants solicitors were absolutely entitled to or ought to have preserved for their clients the right and the liberty to question the judgment; and this they failed to do so!!

The learned trial judge then went on to strike out the appellant's appeal on the ground that it was vexatious, frivolous, oppressive and an abuse of the process of the court. When he did so the learned judge in his judgment said:

> From the facts and the law as adduced; the very foundation or the substratum of the appeals has been destroyed; and have thus become nugatory. It has always been the fundamental feature of our Judicial System that the courts do only decide issues that are alive; not dead or those that have become hypothetical or only of academic importance. In the circumstances, the plaintiff's application under Order 18 Rule 19 of the Rules of the High Court is hereby allowed with costs and the two appeals under enclosures (12) and (19) are struck off with costs.

Learned counsel for the respondent submitted that the present appeal falls squarely on the case of *Metropolitan Real and General Property Trust Ltd. v. Slaters and Bodega, Ltd. and two other appeals* [1941] 1 All ER 310. In that case the claim by the plaintiff was for 200 British pounds for rent due in respect of premises occupied by the defendants which was used for their business of caterers and restaurant. That business had been affected adversely by the war, and the defendants found difficulty in paying all their

debts out of the immediate profits of that business. They were, however, owners of property worth about 1,000,000 British pounds which was mortgaged for about 450,000 British pounds. Therefore, there was ample security for any debts not immediately paid. When judgment under O. 14 was given against the defendants, they applied for relief under the Courts (Emergency Powers) Act 1939. Apparently, this Act was a special act to give relief in paying judgment debts. The master granted relief upon certain terms. The plaintiffs appealed and Wrottesley J, reversing the order of the master, gave the plaintiffs leave to appeal, but gave no order as to a stay of execution. Before this appeal was heard, the defendants paid all sums due under the judgment. In the Court of Appeal, Sir Wilfrid Greene MR at p. 311 said:

> The fact that payment has been made destroys the whole basis of this appeal, and the result is that the appeal must be dismissed with the usual consequences. Generally, I would say with regard to applications under the Courts (Emergency Powers) Act, 1939, that, in the case of a judgment for money – I say nothing about other cases – where leave to appeal is given to the debtor, it should follow as a matter of course, and it should be expressly stated in the order, that there should be a stay of execution pending the appeal. If that course is taken, the debtor is under a compulsion to pay. As soon as he pays, the judgment is satisfied, and the substratum of the case is irretrievably destroyed. Therefore, it follows that, where leave to appeal is given to a debtor, the debtor should have a stay of execution in order that his appeal may be determined.

On the other hand, the appellant cited the case of *Baker v. Turner* [1950] 1 All ER 834 H/L. In that case the contractual tenant of a dwelling-house to which the Rent Restrictions Acts, 1920-1939, applied, sub-let a room, furnished as a bed-sitting room, together with the right to use the kitchen. The landlord terminated the tenant's contractual tenancy by giving her notice to quit, and, on the expiration of the said notice, sought possession of the whole house, or, alternatively, of the room sub-let, on the grounds that (i) as the use of the kitchen was shared, neither the tenant nor the sub-tenant had a separate dwelling, and that, therefore, neither of them was protected by the Rent Acts, and (ii) the tenancy of the room which was sub-let was not protected inasmuch as (a) the room was furnished, and (b) its occupation was coupled with the use of the kitchen, and therefore, it was not a separate dwelling. In that case the case of *Metropolitan Real and General Property Trust Ltd. v. Slaters & Bodega Ltd. (supra)* was distinguished. At pp. 838 dan 839 Lord Porter in distinguishing that case said:

> The argument that the appeal has abated because the judgment of the Court of Appeal had been executed would, I think, logically lead to the result that whenever a stay had not been granted a successful litigant, if sufficiently active and astute, could execute his judgment and so prevent the determination of any doubtful point of law, even in a case where an appeal lay as of right – eg, from Scotland or Northern Ireland or from an appellate court to your Lordships' House – or from the High Court to the Court of Appeal. The contention was sought to be supported by a reference to *Sun Life Assurance Company of Canada v. Jervis* (2), and *Metropolitan Real and General Property Trust Ltd. v. Slaters & Bodega, Ltd.* (3), but those cases gave rise to very different considerations. ... As to the second case there was no dispute that the defendants owed a sum of money ordered by the court to be paid but they applied under the Courts (Emergency Powers) Act, 1939, for a stay of execution and resulting postponment of payment. The learned judge, reversing the order of the master, gave the plaintiffs leave to proceed to execution and also granted leave to appeal, but made no order staying execution. Before the appeal was heard, the defendants paid all sums due under the judgment. In these circumstances, as the only remedy would have been to order the repayment to the defendants of a sum admittedly due and paid, the Court of Appeal held that the basis of the appeal was destroyed. ...

As can be seen, instead of overruling *Metropolitan Real and General Property Trust Ltd.,* the House of Lords found it fit only to distinguish that case. The House of Lords in coming to its decision in *Baker v. Turner* found that the sub-tenant had no separate dwelling and as such the landlord was not entitled to possession of the whole house. In my view when the House of Lords distinguished *Metropolitan Real and General Property Trust Ltd.*, the House of Lords recognised the principle that when full payment is made of a judgment sum as in the case of *Metropolitan Real and General Property Trust Ltd.*, then the basis of the appeal is destroyed. The present appeal, if not identical, is similar, to the facts and circumstances as *Metropolitan Real and General Property Trust Ltd.* I am of the view the learned trial judge was correct when he applied the principle in *Metropolitan Real and General Property Trust Ltd.* to the present appeal and came to the conclusion that the substratum of the appeal had been destroyed. In *Metropolitan Real and General Property Trust Ltd.*, the Courts (Emergency Powers) Act 1939, gave the court more power of reliefs to the defendants in paying the judgment sum, but when the defendants made the payments the substratum of the appeal was extinguished and as such the appeal was struck off. In the present appeal no such relief is given under any law. I would therefore dismiss the appeal with costs and the order of the learned judge be affirmed.